

(1977) 08 CAL CK 0003

Calcutta High Court

Case No: None

Madhusudan Poddar

APPELLANT

Vs

Arabinda Poddar and Another

RESPONDENT

Date of Decision: Aug. 5, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13

Citation: 82 CWN 215

Hon'ble Judges: S.K. Datta, J

Bench: Single Bench

Advocate: R.N. Saha, for the Appellant; Bhuban Mohan Saha, for the Respondent

Judgement

S.K. Datta, J.

This Rule is directed against an order passed by the Appellate Court allowing the Misc. Case under Order 9 Rule 13 of the Code of Civil Procedure. It appears that the Plaintiff-Petitioner instituted a suit in the Third Court of the Munsif at Sealdah being Title Suit No. 129 of 1971 against the Defendants for recovery of possession of the suit premises in their possession. The summons was served under the ordinary process by affixation on alleged refusal. But on June 17, 1971, the learned Munsif recorded the following order "Plaintiff files Hazira. Summons served. But service is not satisfactory. For better precaution Plaintiff to issue R.P.C. upon the Defendant by Registered Post with acknowledgement due." Thereafter registered post cards were attempted to be served on the two Defendants at their address given in the plaint but the post cards were returned with the endorsement "Refused". The Defendants did not appear in the suit and the suit was decreed exparte on February 4, 1972. It is stated that the decree-holder obtained possession of the suit premises comprising tow rooms in the first floor of premises No. 52, Dr. S. P. Mukherjee Road, Dum Dum on February 15, 1973 by breaking open the padlock in execution of the exparte decree.

2. According to the Defendant opposite parties they came to know for the first time on February 21, 1973, that the padlock on the doors of the rooms had been broken and new padlock had been put in. On making enquiries they came to know that he possession of the two rooms was taken as aforesaid and thereafter on further enquiry they came to know of the said decree and the execution thereof. On March 16, 1973, they filed an application for setting aside the ex parte decree on the ground that the Summons and all Court processes in the suit were suppressed illegally and the Petitioner fraudulently obtained possession of the room in execution of the said decree. On this application Misc. Case No. 38 of 1973 was started which was contested by the Plaintiff-decree holder. The learned Munsif was of opinion that the refusal of the post cards raised the presumption that the Defendants were trying to avoid service of summons and considering these circumstances he was not inclined to believe the evidence of P. W. 1 on behalf of the opposite parties denying the service by the process-server or the postal peon. Accordingly, the learned Munsif considering the facts and circumstances of the case accepted the return of the process-server to the effected by affixation after refusal of the Defendants to accept the same. The registered post cards were sent as precautionary measure and further the post cards contained concise statement of the plaint by setting the names of the parties of the suit described as title suit as also the date of hearing which were also refused. Accordingly, the Misc. case was dismissed.

3. On appeal the learned Appellate Court was of opinion that there was no service of summons by the process-server as there was nothing to indicate that the Mokabila witnesses were of the locality which was the ground for believing that the service was not satisfactory. About the service by registered post card the Appellate Court held that it was not a substitute for the service of summons as it was not accompanied by a copy of the plaint. Reliance was also placed on the decision in *M. G. Dua v. Balli Mal Nawal Kishore* AIR 1950 P&H 467. The Court held therein that, if any other mode of service was tried in the first instance and it was unsuccessful, it was not open to the Court, in view of the prohibition contained in the proviso to Rule 10 Order v. to endeavour to effect service on the Defendant by registered post. The Punjab decision, however, should not have been relied on under a proviso added by Punjab High Court to Rule 10 of Order v. first service, cannot be by registered post.

4. It is obvious that the learned Munsif was satisfied that the first service was unsatisfactory, that is to say, the summons was not duly served and it was for this reason that he directed fresh service by Registered Post Card. It is not necessary accordingly for me to consider whether first service of summons under the usual process was due service under the law or not and sitting in Revisional jurisdiction it is not open for me to reconsider a finding thereon fact arrived at by the Appellate Court on due consideration of the relevant circumstances.

5. Mr. R. N. Saha, learned Advocate appearing for the Petitioner submits that under Order 5 Rule 2 every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. It is the usual practice in our courts to give notice of the suit by registered post card on the failure to serve summons duly on the Defendant by the usual process. If such notice is intended to be summons of the suit it is not necessary that the copy of the plaint should also be annexed thereto as under Rule 2 Order v. it is permissible to set out therein a concise statement of the plaint if so sanctioned by the Court. Before notice by registered post card is directed it is necessary that the court should also direct that a concise statement of the plaint should also be set out in such notice in order that such notice may be treated as summons of the suit. Order 9 Rule 13 provides for setting aside ex parte decree on two grounds (1) the summons was not duly served (2) though the summons was duly served, the Defendant was prevented by sufficient cause from appearing when the suit was called for hearing. Unless there is thus due service of summons, a decree is vulnerable from attack on the above grounds. In the case before us an attempt was made to serve the Defendants by registered post card. The registered post cards which were alleged to have refused unfortunately do not contain any concise statement of the plaint. It simply states that a suit has been filed by the Plaintiff against the Defendants and though the suit number is given and is described as a Title suit those words do not by themselves indicate what can be taken to be a concise statement of the plaint. For this reason in my opinion, it must be held that service by registered post card in the present case could not be accepted as a good service of the summons under the law even if we accept refusal of registered post cards as good service thereof though the Defendants had denied such refusal by them. There is thus no escape from the conclusion that no summons was duly served on the Defendants as required under the law. The decree accordingly was rightly set aside by the Appellate Court. The Rule accordingly, fails and is discharged But as the suit was filed as early as 1971 I directed that the suit be heard out with utmost expedition. Let the records be sent down as expeditiously as possible.

There will be no order as to costs.